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THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION'S
GUIDELINES: EMPLOYMENT DISCRIMINATION
ON THE BASIS OF HANDICAP - CHAPTER 151B

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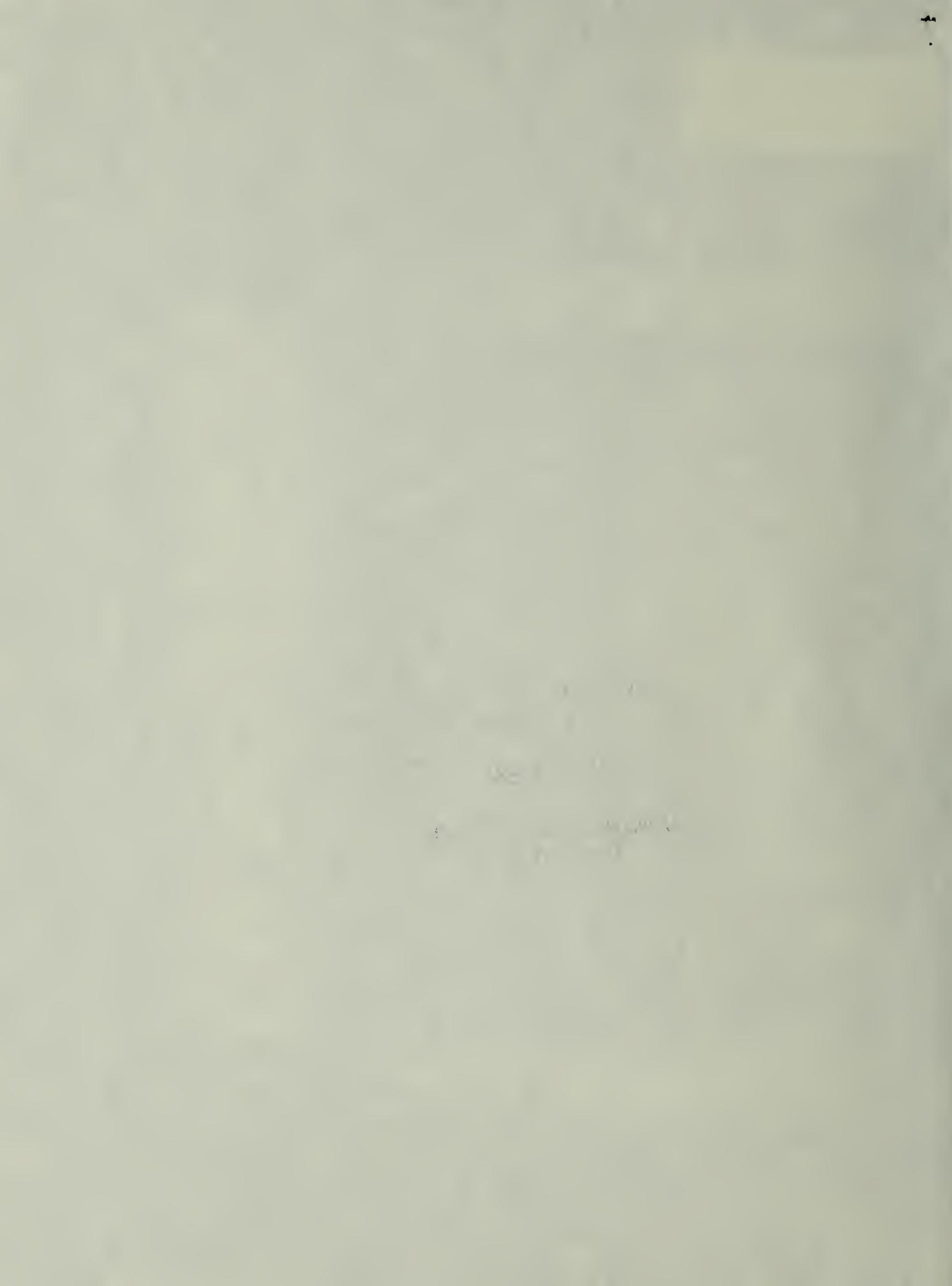
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GUIDELINES: EMPLOYMENT DISCRIMINATION
ON THE BASIS OF HANDICAP-CHAPTER 151B

I. INTRODUCTION

In 1983, the Massachusetts Legislature amended the Fair Employment Practices Law to prohibit discrimination in employment on the basis of handicap. These guidelines are intended to assist employers, labor organizations, employment agencies and persons with handicaps in understanding what employment practices are unlawful and what steps must be taken to ensure that handicapped persons are provided with job opportunities equal to those of other employees. The standards governing employment practices in regard to handicapped persons are part of the statutory framework governing fair employment practices under M. G. L. c. 151B and should be interpreted in conjunction with the Fair Employment Practices regulations found at 804 C.M.R. 3:00.

II. DEFINITIONS

A. Handicapped Person

1. Statutory Definition

Chapter 151B defines a "handicapped person" as "any person who has a physical or mental impairment which substantially limits one or more of such person's major life

activities, has a record of such impairment, or is regarded as having such impairment." A "major life activity" generally includes, but is not limited to, such functions as walking, sitting, standing, speaking, working, caring for one's self, seeing, hearing, breathing and learning.

An individual is considered to be handicapped in three different instances:

1. An individual is "handicapped" when he/she has a physical or mental limitation which substantially limits his/her ability to perform any function which may be considered a "major life activity" as outlined above.

2. A person is considered to be "handicapped" if he/she has a past record or medical history of a physical or mental impairment, even though the impairment may no longer exist. For example, a person who was treated for cancer five years ago but who has been cancer free since that time would still be entitled to protection under the law as a "handicapped person" and could not be denied any job opportunity because of his/her past medical history.

3. An individual may be considered to be "handicapped" under the law even if he/she has no physical or mental impairment, but the employer regards him/her as having an impairment. For example, a person who has high blood pressure or a spinal defect or is obese may have no

functional impairments, but an employer may refuse to hire that person because the employer regards such condition as a health risk or believes that hiring him/her will drive up employee group insurance rates. Such an individual, who has no physical or mental limitations may by being regarded as "handicapped" be entitled to the protections afforded by M. G. L. c. 151B.

2. Substance Abusers

For the purposes of Massachusetts law, individuals who abuse alcohol or other substances because of a physical or mental addiction may be considered handicapped under M. G. L. c. 151B, and employers must make reasonable accommodations to their handicaps. "Recreational" or occasional users of alcohol and drugs in most instances will not be considered "handicapped" under the law. "Recreational" or occasional users of alcohol and drugs are typically not physically and/or mentally dependent upon such substances to the extent that one or more of their major life activities is effected.

3. Illnesses

The law also prohibits discrimination against those individuals who are "handicapped" because they have illnesses such as hepatitis, tuberculosis and AIDS.

An employer may not discriminate against a qualified handicapped individual simply because he/she fears contracting a particular illness. Nor is an employer permitted to discriminate against a qualified, handicapped person because of customers' or co-workers' bias against individuals with a particular disease. An individual with an illness may not be excluded from employment where the disease is not readily communicable in the workplace. While an employer may consider the safety of the public and co-workers in making an employment decision about individuals with a communicable disease, an employer may not exclude such an individual from the workplace unless there is a substantial risk that the individual will infect others.

An employer is required to take reasonable steps to accommodate the individual's handicap by allowing the use of prophylactic safeguards that would enable the employee to work in a safe manner.

B. Qualified Handicapped Person

A "qualified handicapped person" is a handicapped person who "can perform the essential functions of a job or can perform the essential functions of a job or can perform the essential functions with reasonable accommodation to (his/her) handicap." M. G. L. c. 151B, §1(16). The

"essential functions" of a job are those activities which must necessarily be performed by an employee to accomplish the principal object(s) of the job. The law does not require that an employer hire or promote any handicapped person regardless of whether he/she can perform a job. An employer need only hire or promote a qualified handicapped person.

C. Reasonable Accommodation

A reasonable accommodation is an adjustment made in the way a job is done to accommodate the limitations imposed upon an individual by a handicap so as to enable him/her to do a job. Accommodations may take many forms including changes in work schedules and assigned tasks, modification of job requirements, and provision of adaptive equipment. The employer must provide the accommodation at his/her own expense and will only be released from this duty to make an accommodation only if it would impose "undue hardship." Further discussion of the meaning of these terms and the responsibilities imposed is included later in these guidelines.

III. EMPLOYMENT CRITERIA

A. Functional Relation

To comply with the Fair Employment Practices Law, employment criteria must be designed to measure only those

abilities necessary to perform the essential function of a job. An employer should examine its employment criteria to determine whether they actually measure abilities which are essential to performance of the particular job for which applicants are being screened. Criteria which are not essential should be dropped. For example, an employer might require that for the position of forest ranger, an individual be able to conduct nature tours through the forest and otherwise assist visitors, investigate reports of forest fires and poachers, conduct patrols, watch for fires from the fire tower and perform necessary paperwork. The particular job for which the individual is being considered, however, actually requires only that an individual watch for fires from the fire tower and perform paperwork. In screening applicants, the employer should screen for the ability to perform these functions only and should discard the requirement that the individual be able to perform other functions.

B. Job Descriptions.

After determining which criteria actually describe the abilities necessary to perform essential job functions, the employer should write a job description which describes only these requirements and the essential func-

tions of a particular job. Many employers use job descriptions which are unnecessarily broad and include job functions which the particular employee hired may never have to perform. To comply with the law, a job description should include only those functions which must be performed by that particular employee or that the employee may reasonably be expected to perform in that position.

C. Uniformity

An employer must apply the same set of criteria to all applicants for a particular position. Generally, an employer may not use criteria or an employment test that screens out or tends to screen out handicapped persons.

D. Test Selection and Adaptation

Like other employment criteria, tests must measure only those abilities which are necessary to perform essential job functions. An employer should determine whether the tests it uses actually predict an individual's ability to perform the essential functions of the job and modify or discard those tests which test non-essential abilities. If the test used screens out or tends to screen out persons with handicaps, the employer must attempt to find other tests which predict job performance without screening out individuals with handicaps. An employer should consider

that some people with sensory, manual, or speech impairments may not perform well on a particular type of test, but may be perfectly capable of performing the job in question. For example, a person with a speech impediment may be perfectly qualified to perform a job which does not require clear speech. Yet, if given an oral test, he/she would not perform satisfactorily. The test would not predict his/her job performance, but rather, would reflect the impaired speech and so would not meet the requirements of the law.

Employers must make accommodations where necessary to ensure that tests actually measure the abilities they are intended to measure. Such accommodations may include but are not limited to the following:

- 1) Provision of extra time;
- 2) Provision of a reader or interpreter;
- 3) Tape recorded test;
- 4) Allowing test answers to be recorded in alternative ways.

IV. PREEMPLOYMENT INQUIRIES

A. In General

The law states that "an employer may not make preemployment inquiry of an applicant as to whether the

applicant is a handicapped individual or as to the nature or severity of the handicap...." M. G. L. c. 151B, §16. The term "pre-employment" means the period prior to the time at which the employer makes a conditional job offer. The term "inquiry" includes any means used to elicit information. An employer may not ask an applicant whether he/she is handicapped before the employer offers that person a job. This prohibition includes both direct and indirect questions that might compel an individual to reveal a handicap.

B. Prohibited Inquiries

The following questions which often appear on traditional application forms are unlawful:

- ° "Are you handicapped? If so, to what extent?"
- ° "Do you have any job related handicaps that would prevent you from doing the job?"
- ° "What is the nature of your disability?"
- ° "Have you ever had any of the following conditions...rupture, hernia, arthritis, diabetes, epilepsy?"
- ° "Do you know of any reason you might have difficulty performing the job?"
- ° "Have you ever been rejected for health or life insurance?"
- ° "Have you ever received Workmen's Compensation?"
- ° "Have you ever been hospitalized?"

- ° "Are you now or have you ever been under the care of a physician?"
- ° "Do you have any physical or mental handicaps or limitations?"
- ° List any physical defects _____.
- ° "Were you injured? Give details _____."
- ° "Have you ever received psychiatric treatment?"
- ° "Have you any defects in hearing _____ speech _____ and vision _____?"
- ° "Do you have any physical handicaps, disease or other disability which should be considered in assigning you to work?"
- ° "Do you have any limitations which would prevent your performing specific kinds of work or specific schedules?"

Questions concerning an applicant's history of absenteeism may also be suspect and are unlawful if asked to determine the existence, nature or severity of an individual's handicap. An employer may not take action against an individual before or after he/she is hired for failing to answer or answering a prohibited inquiry untruthfully.

C. Permissible Inquiries

An employer may ask an applicant about his/her ability to perform job-related functions. For example, if a particular job requires that a person be able to operate a jackhammer, the employer may ask if the applicant can or has ever operated a jackhammer. If a job requires the skill or

ability to read words printed on a computer screen, the employer may ask the applicant if he/she has this skill or ability. However, the skill or ability must be essential to the particular job for which the individual is applying.

V. MEDICAL EXAMINATIONS

The law states that "an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job..." A conditional job offer is an offer of employment which is valid if the employee passes a medical examination. M. G. L. c. 151B, §16. An employer is permitted to offer a job to an applicant with the stipulation that the individual undergo a medical examination to ascertain whether the applicant is physically able to perform the essential job functions with reasonable accommodation. The medical examination may be conducted only after the employer has offered the job to the applicant, but may take place before the person actually starts working. Prior to giving the physical, the examining physician should be informed of the essential functions of the job that the applicant has been offered. The medical examination should evaluate those abilities necessary to perform

the functions essential to the job. The medical exam must meet the following criteria:

- 1) It is administered to all prospective employees entering the same job category, not only to those applicants with apparent disabilities;
- 2) The only information obtained from the medical exam that should be conveyed to the employer is the opinion of the examining physician or health care practitioner that the prospective employee is either able or unable to perform the essential functions of the job. Any medical history or physical condition that does not pertain to the employee's present ability to perform the essential functions of the job should not be disclosed to the employer and must be kept confidential. If the examining physician concludes that the employee is unable to perform the essential functions of the job, he/she should convey that opinion to the employer together with any suggestions the physician may care to make with regard to accommodations. The physician should inform the prospective employee of the specific reason or basis for the opinion and with the permission of the employee, may inform the employer of the reason.

VI. PROVISION OF REASONABLE ACCOMMODATION

Upon learning that a prospective or current employee has a condition that impairs his/her ability to

perform the essential functions of a job, the employer shall then consider whether a reasonable accommodation could be made that would enable the employee to perform a particular job. If a reasonable accommodation is required to perform the essential functions of a job, failure to provide that reasonable accommodation is in itself a violation of law. An employer should notify all applicants and employees of its obligation to make reasonable accommodations and inform them that an applicant/employee may request a reasonable accommodation if he/she is handicapped and requires an accommodation to perform essential job functions. The employer may solicit proposed accommodations from the employee. An employer is not be required to provide the particular accommodation proposed by the employee/ applicant if an alternative accommodation is effective and enables the individual to perform the essential functions of the job. If an employee identifies him/herself as handicapped and requests a reasonable accommodation, the employer may require substantiation of the existence of the impairment.

If a reasonable accommodation has not been requested, failure to afford one is not a violation unless the employer knows that the individual is handicapped and requires a reasonable accommodation to perform essential job functions. For example, if an employee has an obvious men-

tal impairment and the employer knows of an accommodation which will assist that person in performing essential job functions, then the employer should provide the accommodation, whether or not the employee requests it. Failure to do so violates the law.

Chapter 151B requires an employer make a reasonable accommodation to an individual's handicap, "unless the employer can demonstrate that the accommodation required...would impose an undue hardship to the employer's business."

The following factors may be considered in determining whether a particular accommodation causes undue hardship:

1) whether the provision of the reasonable accommodation will prevent the employer from providing service required by and/in compliance with all federal and state laws and regulations;

2) whether the health or safety of the public would be unduly compromised by providing the accommodation;

3) the overall size and resources of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

4) the type of the employer's operation including the composition and structure of the employer's workforce; and

5) the nature and cost of the accommodation needed.

The employer bears the burden of proving undue hardship. In order to show that an accommodation cannot be made, an employer must show that each and every alternative course of action or accommodation would result in undue hardship. An employer must afford an employment opportunity even when excused from providing an accommodation because of undue hardship. In such situations, an individual may make his/her arrangements in order to take advantage of the employment opportunity. Such arrangements may include the provision of the accommodation by a public or private agency or by the employee him/herself.

VII. AFFIRMATIVE ACTION PROGRAMS

The only instance in which an employer may make an inquiry concerning an applicant's handicap before he/she makes a conditional job offer is when he/she "invites applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts."

M. G. L. c. 151B, §4(16). In any questionnaire used for this purpose an employer must state clearly the following:

- 1) that the information is intended for use in its affirmative action efforts only;
- 2) that the information is being requested on a voluntary basis;

- 3) that refusal to provide this information will not subject the individual to any adverse treatment; and
- 4) that the information will be kept confidential and will be kept separate from the individual's personnel records.

The following statements appearing on a form or questionnaire to encourage an individual to disclose a handicap as part of an affirmative action program are unacceptable:

- 1) "However, information about a job related handicap must be provided."
- 2) "Refusal to provide other than job related information will not subject an individual to adverse treatment."
- 3) "I certify that no attempt has been made to omit pertinent information."
- 4) "Do you have any job related physical or mental limitations."

Information obtained in inquiries made as part of an affirmative action program must be kept completely confidential. It may be revealed only in the following situations: (1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and the necessary accommodations to be made. For example, if a handicapped warehouse employee can lift only 30 pounds, his/her supervisor may be told that he/she can only lift this amount and should be assigned to light duty. (2) First aid and safety personnel may be told about the

individual's impairment if it may require emergency treatment. (3) Government officials investigating compliance with the law must be provided relevant information upon request.

